CONDUCT DATA-DRIVEN INVESTIGATIONS OF SUSPICIOUS EMPLOYMENT CLAIMS DURING PANDEMIC

Bad actors don't let a good crisis go to waste. Shifting of governmental department of health mandates and the absence of systems to capture evidence of compliance have contributed to a perfect storm of fraudulent employment claims during the pandemic. But you can still find hard data to drive your investigations and defense strategies.

During the global pandemic, employees are increasingly filing claims on safety violations and negligence from alleged exposure to hazardous working conditions. Just by November 2020, the number of COVID-19 employment claims filed, in the U.S. alone, was approaching 1,000, according to the JacksonLewis law firm. The same trend is probably emerging globally. (See "Impact of COVID-19 Pandemic on Employment Litigation in 2020," by Paul J. Siegel, Jenna E. Dysart and Heather L. Hulkower, JacksonLewis, Nov. 17, 2020, tinyurl.com/y590kzdv.)

Many of these claims are valid, but some employers and employees might be taking advantage of vulnerable circumstances. When it comes to pandemic-related employee allegations, investigations or litigation defense, organizations can benefit from some creative thinking. They should adopt new, innovative ways to demonstrate corporate integrity and due diligence with respect to how they protect their employees using data analytics.

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Protect essential workers

The pandemic highlights the importance of front-line food workers in grocery stores, supermarkets, food banks and other food vendors. In recognition of their value, the U.S. Centers for Disease Control and Prevention (CDC) issued guidance for employers to reduce transmission among employees, maintain a healthy work environment and continue effective business operations. (See "What Grocery and Food Retail Workers Need to Know about COVID-19," CDC, Nov. 12, 2020, tinyurl.com/yd4aayl5.)

Guidelines include measures ensuring sick employees don't return to work until approved by state and local health departments, protecting employees at greater risk, mandating personal protective equipment (PPE), providing access to soap for hand washing, constructing barriers and reducing payment touch points, providing clear signage, limiting customers in stores and designating points of contact responsible for COVID-19 concerns, among other guidance.

The nearly 40,000 U.S. supermarkets are considering the difficulty of measuring compliance and planning structured approaches to legal defenses. Their failure to implement guidelines in a timely manner could be the deciding factor when employees or family members seek retribution for sickness or tragic deaths.

Hypothetical grocery-chain scenario

In a fictional case, Alice is the head of investigations at a mid-sized grocery retailer with 350 stores in six states across the Northeast U.S. Following an outbreak in mid-March in Pennsylvania where 118 hourly and salaried employees of the grocery chain tested positive for

COVID-19 throughout 12 stores, the U.S. Labor Department's Occupational Safety and Health Administration (OSHA) investigated workplace practices at the company. As a result, the grocery retailer implemented safety measures the next month, including the mandatory provision of PPE, limiting the number of shoppers in stores, requiring temperature checks for employees when they arrived and mandating store closure times for disinfecting procedures.

In addition to dealing with ongoing investigative inquiries from OSHA and Pennsylvania's department of health, Alice needs to prepare for employee allegations that the company failed to mitigate the risk of employees contracting the virus and other potential legal claims across the 350 locations she oversees.

She realizes that any of the company's legal arguments will need to be consistent across its stores. So, Alice has identified and forensically preserved, per Federal Rules of Civil Procedure guidelines, systems at the stores that present human resources data of sick calls, biometric timekeeping procedures and other details of employee actions.

She'll use the data from these systems to begin to piece together a timeline and develop a response to the crisis. Alice has also identified thousands of forms that documented temperature checks and employee mandatory forms that certified their health when they arrived at work. She now must transform this unstructured data into a structured format to correlate information across the 350 sources.

Exploring possible scenarios

While evaluating legal risks associated with the 118 employees who tested positive for COVID-19, Alice considered whether the stores implemented guidelines, when they were in full effect and if employees followed them.

To help her understand and organize her risk areas, she used employee HR data including sick-leave data and attendance logs to identify four possible employee categories:

(1) Employees who tested positive following an extended vacation or leave of absence. In these cases, it would be difficult to attribute causation to the working conditions at the supermarkets given employees' absence from workplaces and their lack of exposure at work.

(2) Employees who live in known outbreak zones or among family members who've previously contracted COVID-19. This category demands more information because it's not clear how these employees contracted COVID-19.

(3) Employees who presented a fever when they arrived at work, and their employers immediately sent them home. It's not clear how these employees contracted COVID-19, but their employers followed effective controls around the implementation of CDC guidelines by sending them home. In contrast, sick employees who continued to work — even after their employers had implemented CDC guidelines and rules about reporting symptoms to management — represented the highest legal risk because this suggested the control measures had failed.

(4) Employees who tested positive prior to the implementation of CDC guidelines or measures mandated by the state department of health. Alice investigated hours worked by these employees. She reported symptoms of other co-workers in the same store prior to an employee testing positive, locations or specific departments within supermarket where the employee worked, and any additional information to understand causality.

Using data to look back in time

Data can seem limited when we view it in isolation. To tell a more complete story, integrate unstructured data sources (such as free text from emails, internal memos or other corporate communications) and structured data sources (such as databases) that an organization typically evaluates separately.

Also, enrich company data with external information (e.g., ZIP codes and other global postal codes with outbreaks, and IP addresses information for mobile workforces to geo-map work-related activities) to provide meaningful insight into historical events, and new perspectives or patterns that wouldn't have otherwise been visible.

In response to the OSHA investigation, Alice created an investigative database to field requests and tell an evidence-based story that helped communicate those categories into which employees fitted. These data sets were instrumental:

(1) Employee human resource data to link employees to their departments and store location ID numbers, useful to determine when, for example, specific stores hired new cleaning staff for additional measures or security staff to limit the number of customers.

(2) Dated transaction logs that showed evidence of COVID-19-related purchases, such as PPE, air purification systems, signs, cleaning supplies and plexiglass installations.

(3) Records of employee hours worked and paid that Alice gathered from human resources systems, were helpful in placing individual employees at stores during different periods of time, including additional security staff that stores hired to limit numbers of customers. Alice paid special attention to all privacy-related information (biometrics, Social Security and other

identifiable information) and reviewed it with in-house legal counsel to ensure data privacy compliance.

(4) Employee sick call logs from human resource systems were useful in creating a timeline for each employee to better understand when they presented symptoms related to their work histories.

(5) Symptoms, positive test dates and pre-existing conditions noted and collected by the state department of health were useful in understanding when management first observed symptoms and whether company officials made effective decisions to protect high-risk individuals.

(6) Temperature-check logs that detailed employees' names, dates, number of family members at home and temperatures from the points of implementation were useful to exhibit effectiveness of controls. The logs were handwritten so they required artificial intelligence tools to transform them to structured data for analysis.

(7) Unstructured data such as executive emails were also useful in establishing how and when management rolled out and communicated guidelines.

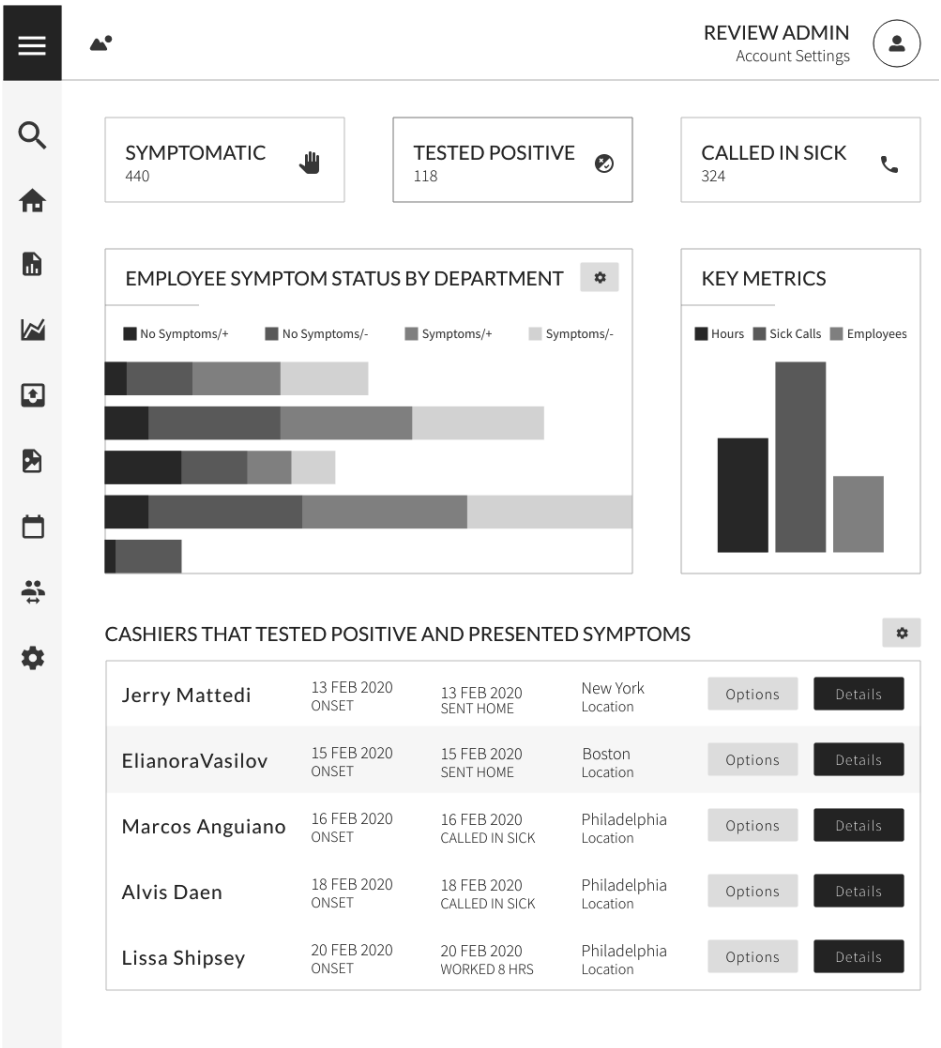

Figure 1: Sample reporting metrics (all names and figures are fictitious)

Utilizing advanced analytics to defend organizations

"For causation of transmission evidence related to a group of people, you need to be able to look across factual historical data, change assumptions and drill in and out very quickly to build larger case themes," says Casey Leech, an attorney with Jackson Lewis P.C., which focuses on labor and employment law.

For our fictional example, some employees indeed obtained COVID-19 from their workplaces despite new safety measures. (See some of the fictitious employee stats in the figure above and on page 11.) The company was able to attenuate much of the risk with data-driven insights, including:

- **Supermarkets took safety seriously** by purchasing plexiglass, cleaning supplies and signs, and hiring staff to limit customers in stores. Alice reviewed and tagged employee safety-related transactions so she could visualize month-over-month expense comparisons related to new purchases. The increase in spend for employee

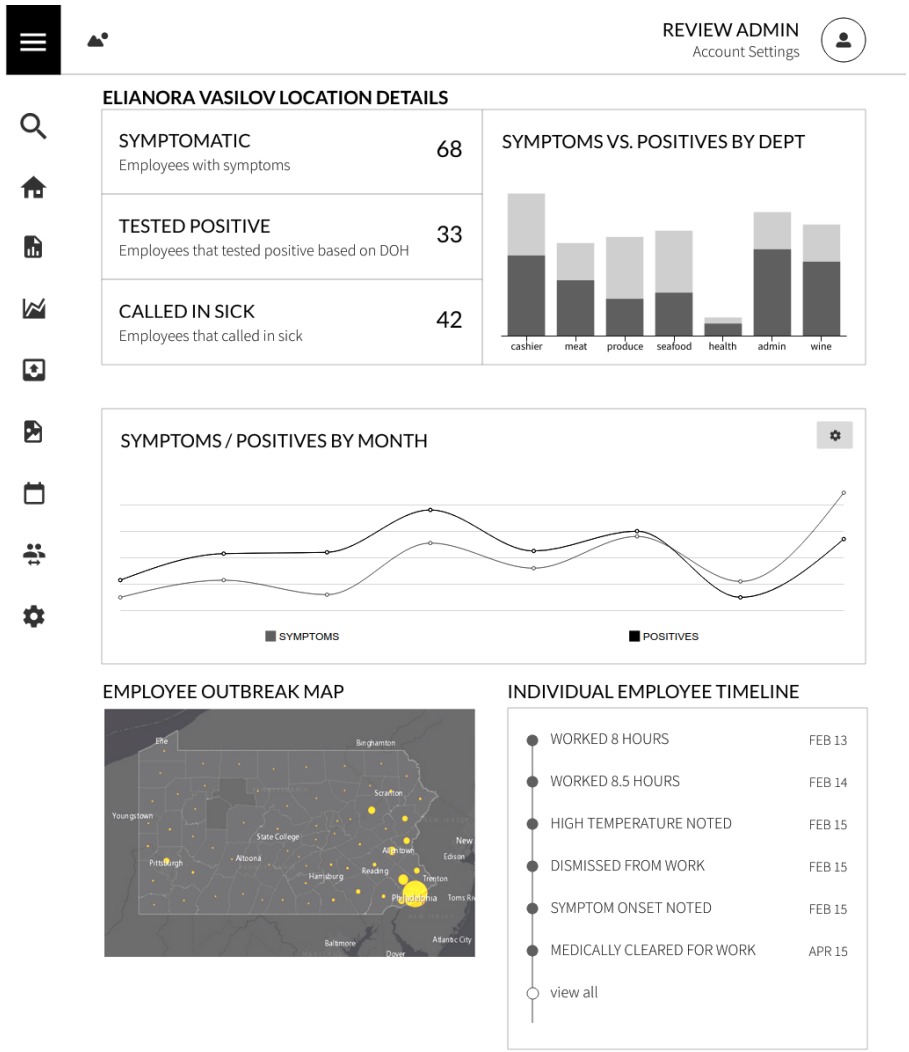

Figure 2: Sample reporting metrics (all names and figures are fictitious)

safety rose by more than 600% from February to March and continues to increase, albeit at a lower growth rate, to date.

- **Supermarkets effectively managed the spread of COVID-19.** They immediately sent home employees with high fevers, with no exceptions. No employees that tested positive returned to work before being medically cleared.
- **Of the 118 employees that tested positive**, 30 of them lived in the same apartment building.

What's next?

The global pandemic has sent shockwaves throughout many facets of business. Compliance in health and safety of employees always will be critical. As we see positive news of the delivery of COVID-19 vaccines, the expectations of historical analysis of company and employee activities during the pandemic will be relevant for current and upcoming disputes and investigations.

The hypothetical scenario in this column pertains to changes in workplace conditions because of the virus. However, organizations can benefit from ever-growing "data fingerprints" that provide accurate historical insights of employees.

Establish appropriate privacy data-consent procedures, plus behavioral analytics, as part of your investigative, compliance and legal governance protocols when you anticipate employee-related investigations. You'll help prevent and deter fraud the pandemic might have caused. ■ FM

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